Supreme Court of the United States

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,

Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,

Respondent.

PETITIONERS' BRIEF.

As appears from the petition, this case involves the validity of the provisions of the Revenue Act of 1924 relating to a tax on gifts.

The Circuit Court of Appeals for the Sixth Circuit has certified questions concerning certain phases of the unconstitutionality of the Act in *Blodgett* v. *Holden,* which

is No. 779 upon the docket of the present term, and that case has been advanced for argument at the beginning of the October, 1927, term.

A writ of certiorari has also been granted in *McNeir* v. *Anderson*, No. 966 on the docket of the present term.

In both of those cases emphasis has been laid on the theory that this is a direct tax which has not been laid in compliance with the requirements of Article I, Section 9, subdivision (4), of the Constitution of the United States. It is also contended in both cases that the Act of 1924 is not retroactive.

Both of these propositions are also presented by the record in this case. We, however, place special emphasis upon the contention that this tax constitutes a violation of the due process clause of the Fifth Amendment to the Constitution of the United States. While that objection was suggested in *McNeir* v. *Anderson* and was passed upon by the Circuit Court of Appeals for the Second Circuit, it has been treated as of secondary importance. We, however, regard it as the primary objection to the validity of this legislation, although we likewise recognize the merit of the objections presented in both of the cases referred to now pending in this Court.

POINTS.

I.

For the reasons which led to the granting of a writ of certiorari in *McNeir* v. *Anderson*, we urge that a similar writ be granted in the present case.

II.

The gift tax constitutes a deprivation of liberty and property without due process of law in violation of the inhibition of the Fifth Amendment to the Constitution of the United States. This tax relates solely to a gift *inter vivos*, and is imposed solely upon the donor.

The concept of property relates, in a legal sense, not so much to the physical thing itself which is the subject-matter of ownership, as it does to its attributes and to certain rights of the owner in and over the thing itself. They are (1) the right of possession, (2) the right of use and enjoyment, (3) the right of excluding others from such use and enjoyment, and (4) the right to sell or otherwise dispose of it according to the will of the owner.

1 Bl. Comm. 138.

Dickson v. *People*, 168 Ill. 179, 180, 48 N. E. Rep. 108, 39 L. R. A. 116.

Grand Rapids Booming Co. v. *Jarvis*, 30 Mich. 308, 321.

Chicago etc. R. Co. v. *Englewood Connecting R. Co.*, 115 Ill. 375, 385.

Wynehamer v. *People*, 13 N. Y. 378, 379.

Sherman v. *Elder*, 24 N. Y. 381, 384.

People ex rel. Manhattan Savings Inst. v. *Otis*, 90 N. Y. 48, 52.

Janes v. *Omaha Street R. Co.*, 53 Neb. 631, 653.
Eastern v. *Boston etc. R. R. Co.*, 51 N. H. 504, 511.
Smith v. *Campbell*, 10 N. C. 595, 597.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an act which would hamper the right of disposition by imposing conditions which would impair such right of disposition, as, for example, a law which would prohibit the owner of property from giving away more than one-half or one-fourth of his property. In like manner, it is our contention that an act which would impose as a condition to the making of a gift or penalize such gift by exacting the payment of a tax, would likewise deprive an owner of property of one of its essential attributes without due process of law.

If, for example, a tax were imposed upon a gift to the extent of 5 per cent. of its substance, it would by the same token justify the exaction by further legislation of 50 per cent. upon the amount of the gift. What, then, would become of the right of disposition? Who would set the limits on the amount that may be taken? There is no express power conferred upon Congress to impose such a tax, nor is there any accepted principle in the law of taxation which would confer upon the law-making power the right to lay such a tax upon the act of giving. So far as we are informed, there is no precedent for such a tax; certainly not for the creation of such a tax by Congress.

Before the moment of making the gift, Congress could not have imposed a tax upon the property which was the subject of the gift. Upon what theory, then, has the status

of the property changed or the right of the owner been altered by the mere fact that he is giving the property to the persons whom he has selected as its recipients by way of a gift *inter vivos?* In making the gift the donor is merely exercising one of his fundamental rights. He is not deriving any privilege from any Act of Congress or from any ordinance or governmental permission to make the gift. He is not acting pursuant to any license; nor is he holding his property by virtue of any governmental sanction nor because he is carrying on any business or occupation under its authority; nor is it necessary for him to secure governmental consent to the act of giving.

In this respect there is a wide distinction between an inheritance and a gift. At common law the State might have intervened upon the death of the owner of property and taken it for its own purposes. The right, therefore, to acquire the property of a dead man, either under his will or under the Statutes of Distribution or Descent, is a matter of grace. Moreover, the title of the property is, in such cases, ordinarily transferred through the aid of the courts, and is thus dependent upon governmental sanction. This is clearly brought out in the opinions in *Knowlton* v. *Moore*, 178 U. S. 41, and *Blackstone* v. *Miller*, 188 U. S. 189, 205. It follows that, in such a case, the Government, having the inherent power to take all of the decedent's property upon his death, may take any part of it in the form of death duties or inheritance taxes. None of those considerations are applicable to gifts *inter vivos*.

Under the Federal Income and Estate Tax Laws, beginning with the Act of 1913 and repeated in the Acts of 1916, 1917, 1918, 1921 and 1924, it is provided that the value of property acquired by gift, bequest, devise or descent shall be exempt from taxation as income, so far as the donee is concerned. Under the Inheritance Tax Law, Section 202b of the Act of 1916, Section 402c of the Acts of

1919 and 1921, and Section 302c of the Act of 1924, there is to be included in the estate of a decedent, for purposes of taxation, the value at the time of his death of any interest of which he has made a transfer or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death. In that connection, however, it was provided that a final distribution of property made by a decedent within two years prior to his death, without consideration, unless the contrary be shown, is to be deemed to have been made in contemplation of death within the meaning of the statute. This provision carried out the legislative policy with regard to attempts that might be made to evade the object of the Estate Tax Law.

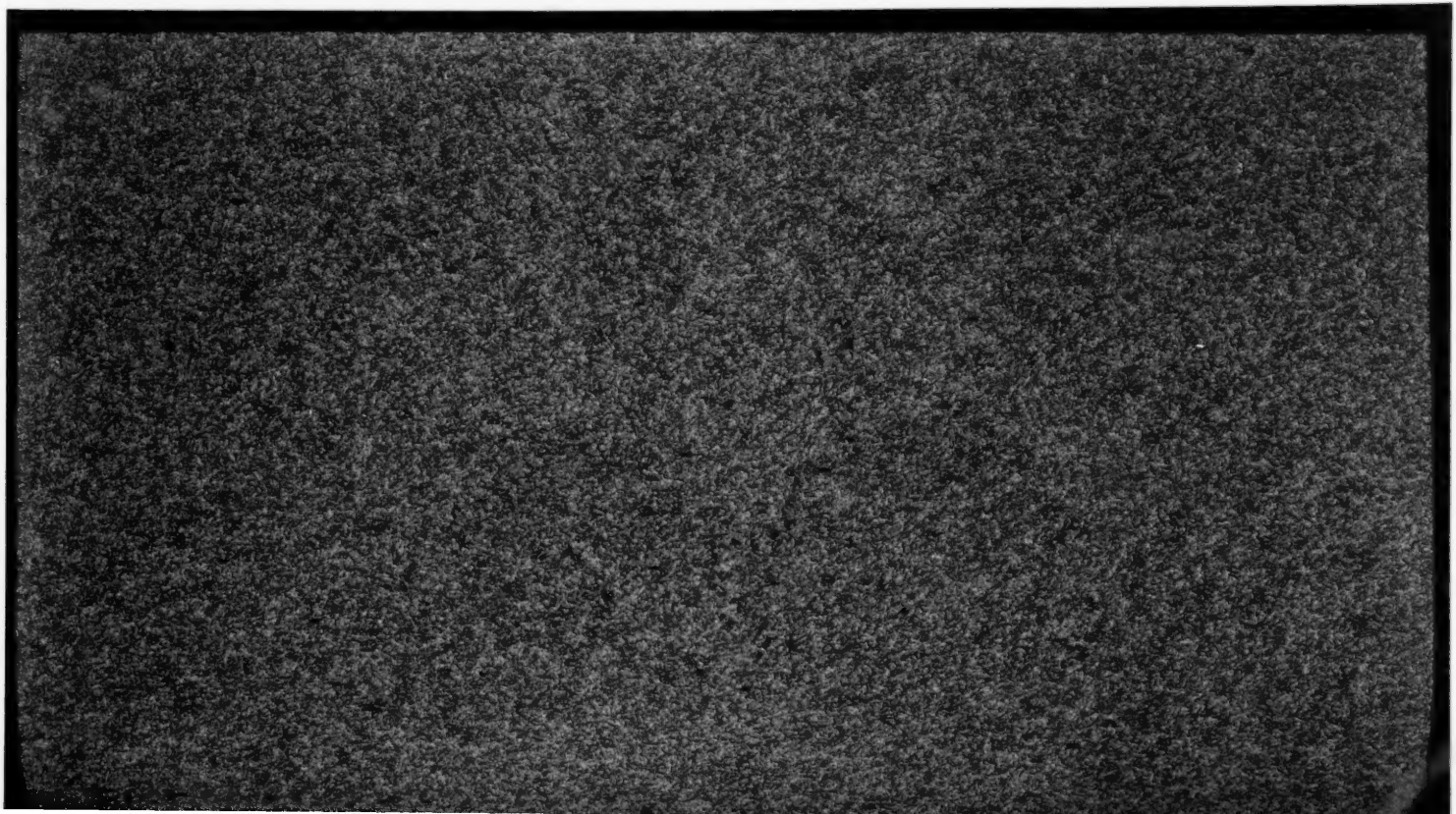
In respect to the Gift Tax Act of 1924, however, there is nothing which indicates the statute to have any relevancy to the prevention of the evasion of an inheritance tax, because ample provision was made in the sections just discussed to prevent such evasion. There is nothing in the Gift Tax Law of 1924 which in any way conveys the thought that it is intended to secure the collection of an inheritance tax. *It is not directed against the donee, but solely against the donor. It relates to any gift, however remote in time from the ultimate death of the donor.* As a tax, therefore, it is the very converse of an inheritance or estate tax.

That there are limits to the power of taxation has been clearly established in the *Child Labor Tax Case,* 259 U. S. 20, and in *Hill* v. *Wallace,* 259 U. S. 44.

III.

In view of the importance of the constitutional question sought to be presented, it is respectfully prayed that the petition for a writ of certiorari be granted.

LOUIS MARSHALL,
Petitioners' Counsel.





INDEX.

PAGE

STATEMENT 1

ASSIGNMENTS OF ERROR 3

POINT I—A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States 6

POINT II—Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the gift sought to be taxed of his property without due process of law 15

POINT III—The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3, of the Constitution 27

POINT IV—The judgment should be reversed and the case remitted for the purpose of rendering judgment for the petitioners as prayed for in their complaint 30

CASES CITED.

PAGE

Anderson v. McNeir (10 Fed., 2nd, 813; 16 Fed., 2nd, 970) 2, 7, 9, 27

Blackstone v. Miller (188 U. S. 200) 21
Blodgett v. Holden (11 Fed., 2nd, 190; 48 Sup. Ct. Rep. 105) 6, 7, 9, 14, 30
Buchanan v. Warley (245 U. S. 60) 19

Chicago & W. I. R. R. Co. v. Englewood Con. Ry. Co. (115 Ill. 375) 17, 20
Cook v. Pennsylvania (97 U. S. 566) 30
Craig v. Taylor (192 Ky. 36, 39) 28

Dawson v. Kentucky Distilleries (255 U. S. 288) ... 27, 28
Dixon v. People (168 Ill. 179) 20

Eaton v. B. C. & M. R. R. (51 N. H. 504) 18, 20
Edwards v. Jones (1 Myl. & Craig 226) 20
Exchange Bank v. Hines (3 Ohio St. 1, 8) 20

Fairbank v. United States (181 U. S. 283) 30

Gardiner v. Parker (3 Madd. 102) 20
Grand Rapids Booming Co. v. Jarvis (30 Mich. 308) . 20

Jaynes v. Omaha St. R. Co. (53 Neb. 631) 18, 20

Knowlton v. Moore (178 U. S. 41) 20, 27
Knox v. McElligott (258 U. S. 546) 12
Kuhn v. Common Council (70 Mich. 534) 20

Levy v. Wardell (258 U. S. 542) 12
Llewellyn v. Frick (268 U. S. 238) 12

McNeir v. Anderson 7, 9
Magoun v. Illinois Sav. & Tr. Co. (170 U. S. 281) 21

Nichols v. Coolidge (47 Sup. Ct. 710) 14
Nicol v. Ames (173 U. S. 509) 25, 27, 30

PAGE

People ex rel. Hatch v. Reardon (184 U. S. 431, 204 U. S. 152) 25
People v. Otis (90 N. Y. 52) 17
Pollock v. Farmers' Loan & Trust Co. (157 U. S. 429, 158 U. S. 601) 25, 27, 29

Reynolds v. McArthur (2 Pet. 417, 434) 12

Schlesinger v. Wisconsin (270 U. S. 230) 23
Sherman v. Elder (24 N. Y. 381) 17
Shwab v. Doyle (258 U. S. 529) 10
Smietanka v. First Tr. & Sav. Bank (257 U. S. 602) . 12
Smith v. Campbell (10 N. C. 595) 18, 20

Thomas v. United States (192 U. S. 363) 25
Thompson v. Kreutzer (112 Miss. 165) 28
Thompson v. McLeod (112 Miss. 383) 28

Union Trust Co. v. Wardell (258 U. S. 537) 12
United States v. Field (255 U. S. 257) 12

Weston v. Charleston (2 Pet. 449) 30
Williams v. Guile (117 N. Y. 348) 20
Wynehamer v. People (13 N. Y. 396) 16

TEXT BOOKS.

Bouvier's Law Dictionary, Baldwin's Century Edition (1926), p. 995 15

Story, Eq. Jur., Sec. 606 20

Supreme Court of the United States

OCTOBER TERM, 1927.

FANNIE E. UNTERMYER, as Executrix, and EDWARD D. UNTERMYER, as Executor of Isaac Untermyer, deceased, Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue for the Third Collection District of New York.

No. 221.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

The action was brought by the testator, Isaac Untermyer, in his lifetime to recover from the Collector of Internal Revenue the sum of $2,782.86 with interest from April 1, 1925, the amount collected under protest as a tax on gifts made by the testator on May 23, 1924, to the amount of $193,100, it being contended that the gift tax was unconstitutional for reasons stated, and that in any event no tax was assessable upon the gifts made by the plaintiff prior to June 2, 1924 (*Rec., pp.* 2-5).

The case was tried before Honorable Francis A. Winslow, United States District Judge, and a jury on March 8, 1927, on an agreed state of facts (*Rec., pp.* 14-16), among which is the following:

> "Eighth. That the gift made by plaintiffs' testator upon which the tax herein referred to was imposed was made on the 23rd day of May, 1924."

The petitioners' counsel then moved for the direction of a verdict for the plaintiffs on the various grounds set forth on pages 19-20 of the record, including the following:

> "(9) That the provisions of Sections 319, 320, et seq. of the Revenue Act of June 2, 1924, did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statutes were not retroactive."

The motion for the direction of a verdict was denied and the ruling was duly excepted to.

Thereupon the defendant's counsel moved for the direction of a verdict in favor of the defendant for a dismissal of the complaint on the authority of *Anderson, Collector,* v. *McNeir,* 16 Fed. (2nd) 970. This motion was granted, and the plaintiffs' counsel duly excepted (*Rec., p.* 20).

A writ of error was thereupon sued out to the United States Circuit Court of Appeals for the Second Circuit, where the judgment was affirmed, and thereafter a petition for a writ of certiorari was granted by this Court on May 2, 1927.

The record presents the following

Assignments of Error:

FIRST. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

SECOND. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

THIRD. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

FOURTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*,

of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

FIFTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

SIXTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax upon gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax imposed upon the donor because of the making of the gift is not predicable upon a valid exercise of the taxing power vested in Congress and the imposition of such a tax is in the nature of an act of confiscation.

SEVENTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the tax imposed is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost tax, authorized by the Constitution of the United States, but constitutes a direct tax not laid or imposed in proportion to the census and an enumeration directed to be taken pursuant to the Constitution of the United States, and is violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

EIGHTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that Congress did not have the right, power or authority under the Constitution of the United States to levy or assess any tax upon executed gifts made *inter vivos*, and the gift here in question was concededly such a gift and not a gift *causa mortis*.

NINTH. In that the provisions of Sections 319, 320 *et seq.*, of the Revenue Act of 1924 did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statute were not retroactive.

TENTH. In that the District Court erred in refusing to direct the jury to render a verdict herein in favor of the plaintiffs and against the defendant on the grounds specified in the motion made by plaintiffs on the trial hereof.

ELEVENTH. In that the District Court erred in directing a verdict in favor of the defendant herein and for dismissal of the complaint (*Rec., pp.* 23 *to* 26).

POINTS.

I.

A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States.

By Section 319 of the Revenue Act of 1924, which was approved and became a law on June 2, 1924, it is provided that "for the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * * 1 per centum of the amount of the taxable gifts not in excess of $50,000 * * *."

By the Act of February 26, 1926 (44 Stat. 86, Chap. 27), Section 319 of the Revenue Act of 1924 was amended by subdivision (a) of Section 324 of the Act merely in respect to percentages by which the tax was to be computed, and by subdivision (b) it was expressly provided: "(b) Subdivision (a) of this section shall take effect as of June 2, 1924."

The Decision in Blodgett v. Holden.

It is believed that the decision rendered by this Court on November 21, 1927, in *Blodgett* v. *Holden,* 48 S. C. Rep. 105, has determined that a gift made prior to June 2, 1924, was not made taxable.

On January 3, 1928, this Court, in *McNeir* v. *Anderson,* on confession of error by the Attorney General, reversed the decision in *Anderson* v. *McNeir,* 16 Fed. (2nd) 970, on the authority of *Blodgett* v. *Holden.*

The Attorney General has, however, concluded that this case should be argued, because the gift in question was made subsequent to the presentation for the consideration of Congress of the gift tax provisions in the Revenue Act of 1924, that date being "not prior to February 25th of that year" and the gifts involved in *Blodgett* v. *Holden* and in *McNeir* v. *Anderson* having been made in January, 1924.

This amounts to saying that, although the statute does not refer to the taxation of any gift made on or before February 25, 1924, it has retroactive effect on a gift made after February 25, 1924, because on that day the attention of Congress was for the first time directed to the taxation of such gifts.

In view of the fact that the gifts in the present case were made prior to June 2, 1924, we contend, on the reasoning of this Court in *Blodgett* v. *Holden,* that under the decision there rendered the gift involved in the present case was not taxable.

Blodgett v. *Holden* came before this Court on the certification by the Circuit Court of Appeals for the Sixth Circuit of three questions, the only one answered being:

> "Are the provisions of Sections 319-324 of the Revenue Act of 1924 * * * unconstitutional in so far as they impose and levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, *and made prior to June 2, 1924, on which date the Act was approved,* because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?"

The concluding paragraphs of the opinion of Mr. Justice McReynolds read:

> "Determination of the cause does not require us to consider other objections to the statute which have been advanced. And it is unnecessary to express an opinion concerning the validity of the statute as to transfers subsequent to June 2. Here, all such gifts were within the exemption granted.
>
> So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment. And the question is so answered."

The opinion of Mr. Justice Holmes, in which Justices Brandeis, Sanford and Stone concurred, concludes with the paragraph:

> "On the general question whether there is power to tax gifts I express no opinion now. I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect."

It would seem that there is no real difference, so far as this legislation is concerned, between a gift made in January or February, and one made in May, 1924, since all of them were made before June 2, 1924, when the Revenue Act was approved and went into effect. Until then there was not and never had been any law relating to the taxation of gifts *inter vivos*. The Act spoke as of the time of its approval. It contained no retroactive provision. The mere presentation for consideration by Congress, or by any Legislature, of a bill, is not the equivalent of legislation. Thousands of bills are introduced annually which never become laws; thousands are amended materially after their introduction. In many instances one House may adopt and the other reject proposed legisla-

tion. It also frequently occurs that a bill never assumes its final form until a few days before its passage by Congress; so that nobody can say until actual passage just what, if anything, the legislation will be. The President or Governor whose approval is necessary to the completion of the legislative process, often withholds his approval or induces the recall of the bill for further amendment. It is a significant fact that when President Coolidge signed the Revenue Act of 1924, he took pains to make the precautionary statement:

> *"A gift tax is a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality."*

To apply any other rule of retroactivity, in the absence of express terms in the statute indicating a contrary purpose, than that the dividing line shall be the date when the statute was approved, would introduce confusion and complication, as well as injustice. It would impose upon the citizen the onerous obligation not only of knowing what the law is after the legislative body has spoken and its action has been approved by the executive, but also to know what occurs from day to day, while a bill is undergoing consideration, for the purpose of speculating as to whether or not the bill will ever ripen into legislation. So far as known, there is no precedent which would justify the distinction which the Attorney General is seeking to make between this case and *Blodgett* v. *Holden* and *McNeir* v. *Anderson.*

Treating the Case Regardless of Blodgett v. Holden.

But considering the entire question *de novo,* we contend that the statute is not applicable to any gift made prior to June 2, 1924.

There is nothing in the language of the Act which expressly declares that a gift made prior to June 2, 1924, is intended to be taxed. It is not provided that the tax is

imposed on *all* gifts made during the calendar year. The language adopted is fully satisfied when applied to gifts made during the calendar year subsequent to the date of the passage of the Act. If the purpose of the legislators had been otherwise, they would have referred to the gift as one made either before or after the passage of the Act. The failure to do so gives rise to the presumption that the legislation was intended to be prospective, and not retrospective, in its operation. This is especially true of a law imposing taxation, in regard to which it has been frequently declared that such an Act is not to be extended by implication, and that any doubt as to its operation is to be resolved in favor of the taxpayer.

The terms of the amendment of 1926 gives emphasis to this proposition.

The recent authorities speak with one voice on this subject.

In *Shwab* v. *Doyle,* 258 U. S. 529, the Court was called upon to determine as to the retroactivity of the Revenue Act of 1916, which imposed a tax upon the transfer of the net estate of every decedent dying after its passage, "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has consummated a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death." It was held that the Act was not intended to apply to transactions consummated before its passage, and this ruling was made notwithstanding the fact that the statute further declared that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior to his death* with such a consideration [referring to a fair consideration in money or money's worth], shall, unless shown to the contrary, be deemed to have been made in contemplation of death."

It was further held that the re-enactment of this provision, with the added provision that the transfer or trust should be taxed whether made before or after the passage of the Act, was not a construction of the earlier Act as being retroactive, but was the expression of a new purpose.

In the opinion delivered by Mr. Justice McKenna we read (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent, 455; Eidman v. Martinez, 184 U. S. 545; Gould v. Gould, 245 U. S. 151; Story, Const., § 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' There is absolute prohibition against them when their purpose is punitive; they being then denominated *ex post facto laws.* It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated. The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in United States v. Heth, 3 Cranch, 398, 413; also United States v. Burr, 159 U. S. 78, 82-83. If the absence of such determining declaration gives to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

See also:

Union Trust Co. v. *Wardell,* 258 U. S. 537.
Levy v. *Wardell,* 258 U. S. 542.
Knox v. *McElligott,* 258 U. S. 546.
Reynolds v. *McArthur,* 2 Pet. 417, 434.

Similar in principle are *United States* v. *Field,* 255 U. S. 257, and *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602.

Llewellyn v. *Frick,* 268 U. S. 238, arose under the Revenue Act of February 24, 1919, which purported to include policies insuring the life of a decedent in the gross value of his estate as a basis for fixing the transfer tax thereon, though the policies be payable to beneficiaries other than the estate, and which allowed the executor to recover from such beneficiaries their proportions of such tax and make them personally responsible therefor if not paid when due. This provision was construed as inapplicable to transactions antedating the passage of the Act. While the Court refrained from discussing the limits of the power of Congress in such case, Mr. Justice Holmes said:

> "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Panama R. R. Co. v. Johnson, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

It was also held that a declaration in a subsequent Act dealing with the same subject, that a provision contained in it shall be retroactive, helps the conclusion that the same provision in an earlier Act lacking such declaration was not retroactive.

It may be added that according to this persuasive process of reasoning the same result would follow from the fact that, prior to the passage of the Act now under consideration, Congress had in the Revenue Act expressly declared a purpose to make other cognate provisions applicable to transactions completed before such enactment. This is especially important when one considers that in the Act now under review, Congress, with presumptive knowledge of these statutory precedents, and of the decisions above cited, had deliberately refrained from making a similar declaration of intention.

In the case now before the Court, the gifts sought to be taxed had been executed prior to the passage of the Revenue Act of 1924. They were not gifts *causa mortis*, but *inter vivos*. There is no pretense that they in any way were made in contemplation of death or for the purpose of evading the provisions of law taxing inheritances. The gifts were in every way lawful and made in the exercise of a constitutional right. The fact that they were consummated but a short time prior to the passage of the law does not affect the constitutional question, there being no claim of bad faith. The situation is, therefore, the same as it would have been had the gifts been made one, five, or ten years prior to this enactment. The fact that the rate of the tax is comparatively small as affecting most donors does not subject it to any different rule than would obtain if it were attempted by a law passed in 1927 to tax at the rate of 50 per cent. every gift *inter vivos* made in ordinary course since the beginning of the century.

Were this Act, however, to be interpreted as retrospective in its operation, it would be of so arbitrary a character as to offend against the Fifth Amendment to the Constitution of the United States.

This is believed to be the effect of the ruling in *Nichols* v. *Coolidge,* 47 Sup. Ct. Rep. 710, decided May 31, 1927. There it was held that Section 402c of the Revenue Act of 1918, if construed as requiring a tax on the value of property transferred by decedent prior to its passage in entire good faith and without contemplation of death, merely because the conveyance was intended to take effect in possession at or after death, was so arbitrary as to amount to confiscation, and thus contrary to the protection afforded by the Fifth Amendment. Mr. Justice McReynolds said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

See also

Blodgett v. *Holden,* 48 Sup. Ct. Rep. 105.

II.

Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprives the donor of the gift sought to be taxed of his property without due process of law.

At the time when the gift was made, the donor had the absolute right to deal with the subject-matter of the gift, whether it consisted of realty, chattels, money, or things in action, as he saw fit. It was his property, and one of its incidents, which was in itself a property right, was the power to sell it or to give it away. A law which undertook to prohibit such a right of disposition was in effect confiscatory in its operation. If the law did not go so far as absolutely to prohibit such disposition, but imposed upon the exercise of the power a tax, it would have been *pro tanto* an invasion of the owner's property right, and particularly so if, as respondent contends, the taxing law were enacted subsequent to a transfer made of the property, and retroactive in scope.

It is scarcely necessary to cite many authorities in support of this fundamental principle. The doctrine is compactly stated in Baldwin's Century Edition of *Bouvier's Law Dictionary* (1926) under the title "Property," page 995:

> "When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use

those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prel. tit. 3; Pothier, *des choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 9 id. 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 472; 18 Ves. 193; 6 Bingh. 630."

In *Wynehamer* v. *People,* 13 N. Y. 396, 397, Judge Comstock gives expression to this idea in terms that have become classic:

"Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when men entered into society and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' (Tomlin's Law Dic., Property; 2 Bl. Com. 34.) Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com. 138): 'The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control

> or diminution, save only by the laws of the land.' Chancellor Kent says (2 Kent's Com. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale and placed without the protection of law, it were well that the attempt should be made."

In *Sherman* v. *Elder,* 24 N. Y. 381, 384, Judge Allen said:

> "Property considered as an exclusive right to things contains not only a right to use them but a right to dispose of them either by exchanging them for other things or by giving them away to any other person without any consideration, or even throwing them away."

In *People* v. *Otis,* 90 N. Y. 52, Chief Judge Andrews said:

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision."

In *Chicago & Western Indiana R. R. Co.* v. *Englewood Connecting Rwy. Co.* (1886), 115 Ill. Rep. 375, 385, the Court said:

> "* * * for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898), 53 Neb. 631, 653:

> "* * * 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the constitution, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825), 10 N. C. 595, 597:

> "Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure."

In *Eaton* v. *B. C. & M. R. R.* (1872), 51 N. H. 504, 511:

> "The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103

> Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.' "

A fortiori, any interference with a man's right to give is a taking of his property and a tax on giving is a taking of private property for public use without just compensation and without due process of law.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property involved in the cases cited. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an Act which would hamper the right of disposition by imposing conditions which would impair the right of disposition, as, for example, a law prohibiting the owner of property from making a gift *inter vivos of* more than one-half or one-quarter of his property while he is in a normal state of mind and is not subject to undue influence. In like manner, it is contended that a law which would exact, as a condition or as a penalty for making such gift, the payment of a tax, would likewise deprive the owner of property of one of its essential attributes without due process of law.

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Com. (Cooley's Ed.), 127 (138)."

See also:

Dixon v. *People,* 168 Ill. 179, 180; 39 L. R. A. 116.
Grand Rapids Booming Co. v. *Jarvis,* 30 Mich. 308, 321.
Chicago etc. R. Co. v. *Englewood Connecting R. Co.,* 115 Ill. 375, 385.
Smith v. *Campbell,* 10 N. C. 595, 597.
Jaynes v. *Omaha St. Ry. Co.,* 53 Neb. 631, 653.
Eaton v. *Boston etc. R. Co.,* 51 N. H. 504, 511.
Exchange Bank v. *Hines,* 3 Ohio St. 1, 8.
Kuhn v. *Common Council,* 70 Mich. 534.

The gifts now under consideration were not in the nature of a testamentary gift, like a gift *causa mortis,* which is only to take effect in the contingency of death and is revocable at any time prior to death (*Williams* v. *Guile,* 117 N. Y. 348; *Gardiner* v. *Parker,* 3 Madd. 102; *Edwards* v. *Jones,* 1 Myl. & Craig 226). They were executed gifts *inter vivos,* not "amphibious," as a gift *causa mortis* was described by Mr. Justice Story to be (*Eq. Jur.,* Sec. 606), or ambulatory, incomplete, or revocable during the donor's lifetime—likewise characteristic of a gift *causa mortis.*

The rules which apply to a gift in contemplation of death do not, therefore, obtain in respect to a gift made without such a quasi-testamentary purpose in view.

The rules which appertain to a testamentary disposition of property, or to a right of inheritance, or to a so-called estate tax, have no relation to a gift *inter vivos* not made in contemplation of death. Such a gift does not, therefore, come within the principle of *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77, which related to death duties or succession taxes. The basis of such forms of taxation is now well recognized. It is only by reason of statutory enactments that the property of a dead man can pass under

his will or by inheritance. At common law the sovereign power had the absolute right to appropriate for its own purposes the property owned by a decedent at the time of his death. The privilege of acquiring the property of a dead man, either under his will or pursuant to the Statutes of Descents or Distribution, is merely a matter of grace.

Magoun v. *Illinois Sav. & Tr. Co.*, 170 U. S. 281.
Blackstone v. *Miller*, 188 U. S. 200, 205.

The sovereign, therefore, having theoretically the right to take all of the property of the decedent, may impose an estate or succession tax or death duty upon the transfer of such property to heirs, legatees or devisees, to the extent of the full value of the property or of any amount less than such value. Moreover, it is equally well recognized that, in case of the death of the owner of property, its title is ordinarily transferable only by means of judicial action, and the transfer of title is thus, in a legal sense, dependent upon governmental sanction.

In the case of a gift *inter vivos* this theory does not apply. The sovereign's permission, consent or authority is not required for such a gift. The right to make it is free and untrammeled. The donor is merely exercising one of his fundamental property rights. In making it he is not exercising a privilege based on any statute or ordinance, or upon governmental permission or sanction of any kind. He is not acting under any license. He is not holding his property pursuant to any grace or favor of the sovereign power. Nor is the donor in making the gift carrying on any business or occupation, under authority of government, upon which a tax can be imposed.

Further viewing such a gift from the standpoint of taxation, it is to be observed that Section 319 is in no manner based upon the theory that this tax is imposed for the purpose of preventing the donor to evade the estate tax

imposed by the Revenue Act of 1924, or by any predecessor acts based upon that theory.

By subdivisions (c) and (d) of Section 302 of the Act, that contingency is fully provided for by the declaration that the value of the gross estate of the decedent shall be determined by including in the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death*, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, *made by the decedent within two years prior to his death with such a consideration*, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was *subject at the date of his death to any change through the exercise of a power, either by the decedent alone in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death*, except in case of a bona fide sale for a fair consideration in money or money's worth."

If the gift was, therefore, made in contemplation of death, the subject-matter, under the conditions specified, would be treated as a part of the estate of the decedent, and, thus, taxable. The tax upon a gift *inter vivos* and

not in contemplation of death, however, does not and, as we contend, may not come within the scope of the provisions just quoted.

In *Schlesinger* v. *Wisconsin,* 270 U. S. 230, which arose under the Inheritance Tax Law of Wisconsin, this Court had occasion to consider a provision declaring that every transfer by or grant, bargain, sale or gift made within six years prior to the death of a grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, was to be construed to have been made in contemplation of death within the meaning of the statute. The State courts had enforced this statute in the face of the due process clause of the Fourteenth Amendment. The language quoted from the opinion of the Supreme Court of Wisconsin by Mr. Justice McReynolds is significant:

> " 'The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law. * * * Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death,' [which means] 'that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature. * * * In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death. * * * We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years

> of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administred.'"

The tax imposed by Section 319 on such a gift is not payable by the donee, but by the *donor,* and is, therefore, clearly not a succession, estate or inheritance tax or a death duty, but a tax upon the exercise of the constitutional right of the donor to give away his property. It may have constituted a part or the whole of all of his belongings. To illustrate, he may have owned property valued at exactly $100,000. He may have given it to a religious or charitable institution, or to an individual. He may not have had a penny left. He was within his constitutional right in making the gift. Could he be penalized civilly or criminally because when the tax collector came around he had no property with which to meet the tax imposed by this statute?

Let us further assume that in the case now before the Court the amount of the tax claimed were to constitute 10 per cent. of the gift. If 10 per cent. may be thus exacted, by the same token the payment of 70 per cent or 90 per cent. might be exacted. What, then, would become of the right of disposition? Who would set the limit on the amounts that may be taken?

In seeking to ascertain the basis for the right of taxation upon a gift *inter vivos* not made in contemplation of death, we come to the question as to whether this tax is authorized by the Sixteenth Amendment. That, however, merely empowers Congress "to lay and collect taxes on *incomes* * * * without apportionment among the several States and without regard to any census or enumeration."

But a gift is not regarded as income under any provision of the Revenue Act. On the contrary, it is expressly excluded from the definition of that term; and so far as concerns the donor, upon whom this tax is sought to be laid, it cannot by the wildest flight of fancy be regarded as income. It does not increase, but diminishes, his property.

Nor is this tax similar to a stamp tax imposed upon the transfer of shares in a corporation. The latter is a creature of government. The transfer of its shares is necessarily made with the sanction of government. Hence the imposition of a stamp duty is based upon the idea that a privilege is conferred upon the transferor.

> *People ex rel. Hatch* v. *Reardon,* 184 N. Y. 431; aff'd 204 U. S. 152.
> *Thomas* v. *United States,* 192 U. S. 363.

Certainly Congress had no power to impose this tax upon property, because that would be a direct tax within the decision in *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 158 U. S. 601.

Nor can it be sustained as a tax within the rule laid down in *Nicol* v. *Ames,* 173 U. S. 509, which related to a tax imposed upon the sale of property pursuant to transactions at an exchange or board of trade. There Mr. Justice Peckham, differentiating such a transaction from sales made generally, said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or

> facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

It is needless to argue that such a tax as this cannot be justified by the exercise of the police power, because there is no Federal police power except to the extent conferred by the Eighteenth Amendment. The inquiry is justified as to whether or not a law which taxes the donor of food, clothing or other necessaries of life upon the amount expended for such purposes would be a valid act. If so, gifts to charity, to one's wife and children, to an educational or other philanthropic enterprise, to the community in which one lives, might likewise be made taxable. If valid, the imposition of a tax upon the donor would discourage gifts of such a character and would entail serious detriment to the public welfare. Generosity and kindliness and humane impulses would be penalized. The miser and the egoist alone would be immune.

So far as we have been able to discover, there is no precedent for such a tax as that now under consideration. Despite the frequent opportunities that have arisen to strain the ingenuity of legislators to devise new forms of taxation, it has been left to this recent period in history, when the clashing of warfare had ceased, to impose an exaction upon the maker of a gift *inter vivos,* even though the income upon the subject of the gift is taxable while in the hands of the donee; and, if a direct tax is properly apportioned, the capital of such gift may also be taxed as against the donee. It would certainly stretch the Federal taxing power far beyond the contemplation of the framers of the Constitution to add this burden to the ownership of property and thus to curtail the enjoyment of one of the most important attributes of ownership.

III.

The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3 of the Constitution.

What has been said under Point II as to the character of this tax applies to the proposition now under consideration, and will not be repeated. It is believed that this tax, concededly "novel in this country" and without "historical background," is not an excise tax, as held by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McNeir,* 16 Fed. (2nd) 970, but a direct tax on property, as ruled in that case by Judge Augustus N. Hand in the District Court, 10 Fed. (2nd) 813. The reasoning of the latter opinion, based on *Pollock* v. *Farmers' Loan & Trust Co.* (*supra*), *Nicol* v. *Ames* (*supra*), and *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288, is regarded as more potent than that of the Circuit Court of Appeals.

In the case last cited it was held that a tax on the right to take possession of whiskey from a bonded warehouse, where it was required by law to be placed, was a direct tax, because possession or the right to take possession was regarded as one of the elements of property and not subject to an excise tax. Mr. Justice Brandeis said:

> "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

In *Knowlton* v. *Moore,* 178 U. S. 41, Mr. Justice White conceded that taxes "which are the essential equivalent

of a tax on property generally, real or personal, solely because of its ownership, are direct taxes."

In *Thompson* v. *Kreutzer,* 112 Miss. 165, cited in *Dawson* v. *Kentucky Distilleries Co., supra,* the Court said (p. 167):

> "*A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself.* * * * No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

In *Craig* v. *Taylor,* 192 Ky. 36, 39, the Court said:

> "The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

In *Thompson* v. *McLeod,* 112 Miss. 383, also cited in *Dawson* v. *Kentucky Distilleries Co., supra,* and which involved a statute taxing the extraction of turpentine from any trees in the State, the Court said (p. 388):

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent to the right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 591, Mr. Justice Field said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law, affects the property itself."

Mr. Chief Justice Fuller, after referring to indirect taxes, said (p. 558):

> "But a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Again, at page 581, he said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

On the rehearing of this case (158 U. S. 601) the Chief Justice said:

> "Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

> There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by *forced distinctions between that which gives value to property, and the property itself.*" (Italics ours.)

See also:

Fairbank v. *United States*, 181 U. S. 283.
Nicoll v. *Ames*, 173 U. S. 509.
Weston v. *Charleston*, 2 Pet. 449.
Cook v. *Pennsylvania*, 97 U. S. 566.

It was assumed in *Blodgett* v. *Holden*, 11 Fed. (2nd) 190, that by Section 324 of the Revenue Act of 1924, which makes operative upon the tax created by Section 319 the provisions of law so far as applicable which pertain to the tax imposed by Section 301 (the estate tax), the unpaid tax becomes a lien upon the property (whether of the donor or donee is uncertain). If that were so, then the contention that the tax is a direct tax on property is strengthened.

IV.

It is respectfully submitted that the judgment of the Courts below should be reversed and the case remitted for the purpose of rendering judgment for the petitioners as prayed for in their complaint.

LOUIS MARSHALL,
Of Counsel for Petitioners.